PROOF OF UNMATURED CLAIMS IN BANKRUPTCY.

Our present Bankruptcy Act differs radically from the English statute in respect to the provability of unmatured claims. The English Act of 1883, now in force, and its predecessor of 1869, are notable for the following provision:

"'Liability' shall, for the purposes of this act, include any compensation for work or labor done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment, of money or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or as matter of opinion."[1]

The National Bankruptcy Act of 1898, on the other hand, has no such provision. Section 63*a* thus enumerates the debts of the bankrupt which may be proven and allowed against his estate as:

"(1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments."

[1]Bankruptcy Act of 1883, § 37, subd. 8; Williams, Bankruptcy (8th Eng. ed.) 120.

Under the English law, any claim liable to occur under a contract existing at the time of the bankruptcy, is provable against the bankrupt's estate, and barred by his discharge. The American statute, on the other hand, allows no claim to be proved against the bankrupt's estate unless either (1) it existed, as a fixed liability, against the bankrupt prior to the filing of the petition or (2) the bankruptcy itself, as a matter of substantive law, unaided by any provision of the statute, may be said to operate as a breach of the contract, and thus give rise to a fixed liability.

Section 63*a*, already quoted, allows to be proven against a bankrupt estate a fixed liability, arising on a judgment or a written instrument, although not payable at the time of the bankruptcy, provided an appropriate rebate of interest is credited thereon. This one class of unmatured claims is sanctioned under our bankruptcy practice. But with respect to all other kinds of unmatured claims, our statute gives no relief.

Section 63*b* of our Act, as construed by the courts, gives no help to the holder of an unmatured claim. This section provides that

"*unliquidated* claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

But an unliquidated claim is quite a different thing from an unmatured claim. The term "unliquidated," as used in the statute, applies merely to the assessment of damages on a matured claim. In other words, an unliquidated claim exists only in the case where the bankrupt has broken a special contract, thereby causing damage to the claimant, but the amount of these damages has not been judicially ascertained at the time the bankruptcy petition was filed. An unmatured claim is of quite a different character, and is not covered by Section 63*b*. That section as the Supreme Court has said,

"adds nothing to the class of debts which might be proved under paragraph *a* of the same section [Section 63*a* above quoted]. Its purpose is to permit an unliquidated claim, coming within the provisions of Section 63*a*, to be liquidated as the court should direct."[2]

The time was when the English law was in the same state. Although Great Britain has lived under a bankruptcy system of

[2]Dunbar *v.* Dunbar (1903) 190 U. S. 340.

over two centuries' duration, it was not until 1826 that her law was so amended as to permit the proof of contingent debts.[3] Before that time unmatured claims were not admitted against bankrupt estates. In other words, one hundred years ago the English law, on this point, was just where ours is now. But the first great modern Chancellor, Lord Hardwicke, suggested the amendment which was afterwards made.[4] Even Lord Eldon, who, next after his preeminence as lawyer and judge, was noted for the quality of his Tory horror of reform, echoed this wish of his predecessor.[5] Almost from that moment, to use Lord Halsbury's words, until the adoption of the Act of 1869, the English Parliament was

"engaged in the effort to exhaust every conceivable possibility of liability under which a bankrupt might be, to make it provable in bankruptcy against his estate and relieve the bankrupt for the future from any liability in respect thereof."[6]

The English Act of 1869, of which Lord Halsbury spoke in the passage above quoted, contained, in respect to the allowance of unmatured claims, a provision which was substantially re-enacted in Section 37 of the present English Act of 1883, hereinabove set forth. Any doubt which might have existed as to the meaning of the language Parliament saw fit there to use, and the attitude of the English courts in that regard, was removed by the decision of the House of Lords in *Hardy* v. *Fothergill.*[7]

There the bankrupt bought a leasehold estate, and covenanted to save harmless the person, of whom he bought the lease, from all liability for rent thereafter to accrue. At the time of the bankruptcy, the lease had still eight years to run. The trustee in bankruptcy adopted the lease and sold it as an asset of the estate. Then the bankrupt was discharged, and, some years later, a default in the payment of rent having occurred on the part of the man who purchased the lease of the bankruptcy trustee, the landlord recovered the due amount from the person who had sold the lease to the bankrupt. This person then sued the bankrupt on the latter's original covenant to save the plaintiff harmless from any future liability for rent.

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[3] 6 Geo. IV c. 16.

[4] *Ex parte* Groome (1744) 1 Atk. 115, 120.

[5] *Ex parte* Barker (1803) 9 Ves. 110, 112.

[6] Hardy *v.* Fothergill (1888) L. R. 13 A. C. 351.

[7] *Supra.*

With us, undoubtedly the defendant's discharge in bankruptcy would not bar the suit mentioned. Ever since the leading case of *Dean* v. *Caldwell*[8] it has never been doubted that rent, accruing after the filing of the bankruptcy petition, is not a provable claim.[9] *A fortiori,* no proof of claim could be filed on a covenant to indemnify the claimant against his liability for unaccrued rent. And certainly it is true in England, as it is here, that

"Before the day at which rent is covenanted to be paid, it is in no sense a debt; it is neither *debitum* nor *solvendum;* for if the lessee is evicted before that day, it never becomes payable."[10]

All these considerations were urged in *Hardy* v. *Fothergill*[11] when the Law Lords were called upon to construe the culmination of legislative effort contained in the English Act of 1869. But the Lords unanimously refused ear to such arguments. They held that the plaintiff's claim was barred by the defendant's discharge, because the liability could have been proven against the defendant's estate in bankruptcy.

As Lord Selborne said in that case, Parliament, when it adopted the Act of 1869, cut off from the discussion of bar or court all question as to the provability of future claims. So far as authority now goes in England, the only cases not falling within Section 37 are those (1) where the court considers that it is impossible to estimate in any way whatsoever the amount of the claimant's damages, and (2) contracts capable of specific performance or restraint by equitable procedure. The first of these exceptions is provided for in the statute. "Such a case," says Lord Macnaghten, "is conceivable, but it is one, I think, very unlikely to occur."[12] The second was furnished in a *dictum* by Lord Selborne in *Hardy* v. *Fothergill*[13] which has been followed in a recent decision of the Court of Appeal.[14] But that eminent authority, Lord Justice Vaughan Williams, speaks with weight when he says in the case last cited:

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[8](1879) 127 Mass. 242.

[9]*Ex parte* Houghton (1871) Fed. Cas. No. 6725; Wilson *v.* Trust Co. (1902) 114 Fed. 742; Atkins *v.* Wilcox (1900) 105 Fed. 595; Lamson Stove Co. *v.* Rowland (1902) 114 Fed. 639; Watson *v.* Merrill (1905) 136 Fed. 359.

[10]Gray, C. J., in Deane *v.* Caldwell (1879) 127 Mass. 242.

[11]*Supra.*

[12]Hardy *v.* Fothergill *supra.*

[13]*Supra,* 360.

[14]*In re* Reis [1904] 2 K. B. 769, aff'd under name of Clough *v.* Samuel [1905] A. C. 442.

"I wish to add, by way of caution, that no amount of difficulty in the estimate of the value would justify the exclusion in this court of a proof of debt, because, in my judgment, the plain words of the statute shew that if once the debt or liability, as the case may be, is shewn to come within the definition, the only court which can exclude that debt from the operation of bankruptcy and its consequent discharge in freeing the debtor is the Court of Bankruptcy, and the Court of Bankruptcy dealing with the particular bankruptcy which has occurred."

In re Reis,[15] in which these cautionary words were used, was the case of a covenant by the bankrupt to settle certain property, whensoever he should acquire it, on his wife. It was held that the discharge of the bankrupt did not bar his responsibility under this agreement, because, as Vaughan Williams, *L. J.*, said, it was "a contract made with a different object from the payment of money in any contingency." In *Collyer* v. *Isaacs,*[16] on the other hand, an agreement to mortgage certain property, whenever it should be acquired, was held to be barred by the mortgagor's discharge in bankruptcy. But Jessel, *M. R.*, in his graphic way of putting things, points out that the agreement was in reality collateral for the debt which the property, when acquired, was to secure. Until that property was acquired, and the agreement performed, the agreement itself stood as security for the debt. So, as the discharge of the mortgagor destroyed his liability on the debt, the collateral agreement fell with it. This reasoning was adopted by the learned judges in *In re Reis,*[17] and they distinguished that case from *Collyer* v. *Isaacs* on the ground that an agreement of a bankrupt, to settle after-acquired property on his wife, is collateral to no debt, and contemplates specific performance rather than "the payment of money in any event."

Thus stands the English bankruptcy law of to-day. With exceptions of no importance to the business world because seldom arising in the case of mercantile or financial dealings, the English courts admit to proof and dividend *all* claims against the bankrupt, arising on contract, express or implied, whether matured or not, whether liquidated or not, and no matter how difficult it may be to estimate the amount for which any such claim may take its place on the dividend sheet. To use the words of Lord Justice Vaughan Williams, the law of his country is that

[15] *Supra.*
[16] (1881) L. R. 19 Ch. Div. 342.
[17] *Supra.*

"now all demands arising from contract are provable, however unliquidated or uncertain the amount of the claim, including, therefore, consequential damages, and damages in cases where the amount has not and even cannot be ascertained by fixed rules, and this whether the breach has or has not or could not have occurred before the discharge of the debtor."[18]

Is it impossible for our law to be, in this respect, the same as that of England? As we have seen, our cousins' present statute was the result of many legislative efforts, extending throughout a period exceeding forty years. We have had, in all, four National Bankruptcy Acts. Both the Act of 1841 and that of 1867 were broader, as regards the proof of unmatured claims, than our existing statute. Mr. Justice Peckham has demonstrated this in the opinion rendered in *Dunbar* v. *Dunbar*:[19]

"The language of Section 63*a* of the act of 1898 differs from that contained in the Bankruptcy act of 1867, and also from that of 1841. The act of 1867, provided expressly for cases of contingent debts and contingent liabilities contracted by the bankrupt, and permitted applications to be made to the court to have the present value of the debt or liability ascertained and liquidated, which was to be done in such manner as the court should order, and the creditor was then to be allowed to prove for the amount so ascertained. Section 5 of the act of 1841 * * * provides in terms for the holders of uncertain or contingent demands coming in and proving such debts under the act."

In other words, Congress kept pace with the English Parliament, in this matter, until it came to the adoption of the Act of 1898. By the framing of that statute our law was swept back to where it stood prior to the Act of 1841, and to a point in English legislation attained long before 1826. Such a *bouleversement* is of rare occurrence indeed. It is respectfully suggested that the burden of argument does not rest on one who expresses dissent from so Bourbonlike a policy as here seemed to find expression.

With the sole exception of a claim based on a judgment or written instrument evidencing a fixed liability to accrue on a day certain, our statute admits to proof no claim which, when the bankruptcy petition was filed, was unmatured. Let us take the case of a contract, whose time for performance on the bankrupt's part had not arrived on the day the petition was filed. The bank-

[18] Williams, Bankruptcy (8th Eng. ed.) 122-3.

[19] (1903) 190 U. S. 340. See also the opinion of Noyes, J., in *In re* Roth (1910) 181 Fed. 667.

rupt not having defaulted on the contract up to the day of the bankruptcy, no proof of claim could be offered on the basis of a liability accruing before the bankruptcy. The furthest any of our courts have gone is, in some cases, to allow the claim on the theory that the bankruptcy itself operated as a breach of the agreement.

Obviously this reasoning must have support in some rule of substantive law entirely outside of the Bankruptcy Act, which is silent on that subject. The only principle of contract law which would allow such a result is that which deals with the so-called "anticipatory breach" of a contract. This doctrine, of comparatively recent origin, is that if a party to a contract should, in advance of the stipulated time for performance on his part, announce that he will not abide by the agreement, or does some act which will render him unable to perform it when the time for performance comes, the other party may at once treat the contract as broken, and act accordingly. On this theory, several Federal courts in the Eastern Circuits have allowed proof of claims on contracts where the bankruptcy of the party occurred before the stipulated day of fulfilment.[20] In such a case, of course, the amount of the claim to be filed would be regulated in accordance with the measure of damages prescribed for such a case, where the action on a like anticipatory breach was brought in the courts of law.

This means of allowing proof of unmatured claims in the teeth of our statute, is open to several objections:

The first objection is the narrow scope of the doctrine of anticipatory breach. It is not on every contract that the law allows an action where merely an anticipatory breach has occurred. The authorities profess to limit this right to three kinds of contract, viz.: (1) contracts for the purchase or sale of goods or negotiable securities; (2) contracts for personal services; (3) contracts to marry.[21] An agreement to support another for life would also seem capable of such a breach.[22] But this tendency to restrict its application would render the doctrine of anticipatory breach an inadequate substitute for a statutory provision like that of Eng-

[20] *In re* Pettingill (1905) 137 Fed. 143; *In re* Neff (1907) 157 Fed. 57; *In re* Swift (1901) 112 Fed. 315; *In re* Stern (1902) 116 Fed. 604; *In re* Buffalo Mirror Co. (1905) 15 Am. B. R. 122.

[21] Kelley *v.* Security Co. (1906) 186 N. Y. 16; Roehm *v.* Horst (1899) 178 U. S. 1; 3 Page, Contracts § 1437.

[22] Pierce *v.* Tenn. Coal & C. Co. (1898) 173 U. S. 1.

land. If one kind of unmatured claims is to be allowed against bankrupt estates, all should be.

For instance, no satisfactory reason would appear why, if a claim based on the sale of goods for future deliveries is allowed in proof, a landlord's claim for future installments of rent should not be allowed. Yet all the Circuits agree that unmatured rent is not provable against the bankrupt's estate.[23]

In this respect the Act of 1867 was likewise narrow. Although containing—as we have seen—a broader provision for admission of contingent claims than does our present Act, yet this earlier statute provided that a claim for rent could be made only for such amount as had accrued up to the date of the bankruptcy. Consequently, under the Act of 1867, as well as the present statute, a claim for future rent was not permissible.[24]

Another instance may also be cited. It seems well established that one's agreement to support another for his life is valid and that, if the party agreeing to furnish support breaks his contract at any time during the lifetime of the other, the latter may at once bring suit as for a breach of the entire contract.[25] Yet the Supreme Court, though conceding for the purpose of argument that such a claim might be allowed under the Act of 1898, refused to admit a claim based on an agreement of the bankrupt to support a woman for life or widowhood.[26] The court bases its decision on the difficulty of estimating the possible term of the widowhood. Yet the English courts allow such a claim to be proven.[27]

Other instances as well might be cited, if needed, to emphasize the inadequacy of the solution proposed in the shape of the doctrine of anticipatory breach, even were all the courts agreed upon its admissibility in the four kinds of cases enumerated.

Another objection to solving the problem on the theory of anticipatory breach is that the courts are by no means unanimous that bankruptcy creates such a breach. The reasoning of the courts in the *Pettingill* and other cases above cited is that bankruptcy operates as a breach because, by his adjudication as an in-

[23]Watson *v.* Merrill *supra;* Wilson *v.* Trust Co. *supra;* Atkins *v.* Wilcox *supra;* Lamson Stove Co. *v.* Rowland *supra; In re* Roth *supra.*

[24]Bailey *v.* Loeb (1875) 2 Woods 578; *Ex parte* Houghton *supra; In re* May (1873) 9 Nat. Bank. Reg. 419; *In re* Webb (1872) 6 Nat. Bank. Reg. 302; although we find a dissent from this view expressed by Chase, C. J., when on circuit. *In re* Winn (1868) Chase's Dec. 227.

[25]Pierce *v.* Tenn. Coal & C. Co. *supra.*

[26]Dunbar *v.* Dunbar *supra.*

[27]*Ex parte* Blakemore (1877) L. R. 5 Ch. Div. 372.

solvent person, the bankrupt announces his inability and unwillingness to perform the contract. But there is great difference of opinion on this point. The affirmative of the proposition has the support of very eminent authority. In addition to the cases already cited, we find Jessel, *M. R.*, saying:

"No doubt a man with whom a contract has been entered into may, in certain cases, treat a declaration of insolvency or an adjudication in bankruptcy of the other party to the contract as a refusal to perform the contract, and may, at his election, treat it as a breach of contract."[28]

And James, *L. J.*, expressed himself to a similar effect on one occasion.[29] Nevertheless, there is strong authority against this view. Thus it has been held, in several jurisdictions, that the appointment of a receiver of one's property does not constitute a breach on his part of an executory contract. It is an act of the law, for which he cannot be blamed. The contract, therefore, remains open, and subsisting in all respects, despite the receivership.[30] The same doctrine has long been the law of New York.[31] In *In re Imperial Brewing Co.*[32] Judge Phillips, of Missouri, refuses to allow that bankruptcy can constitute an anticipatory breach of any kind of contract. And very recently, Judge Newman, of Georgia, in an opinion of great thoroughness, has taken the same view.[33] Much is to be said in support of this. The general rule undoubtedly is that

"The mere insolvency of one of the parties to a contract of sale is not equivalent either to a rescission or a breach. It simply relieves the vendor from his agreement to give credit, and payment may be substituted."[34]

The doubt thus created, whether bankruptcy operates as an anticipatory breach, may, of course, ultimately be decided by the Supreme Court. But even should that tribunal hold that bankruptcy has this effect, thus permitting the proof of unmatured

[28] *In re* Northern Counties Ins. Co. (1880) L. R. 17 Ch. Div. 337.

[29] *Ex parte* Stapleton (1879) L. R. 10 Ch. Div. 586.

[30] Malcolmson *v.* Wappoo Mills (1898) 88 Fed. 680; Kansas Union Ins. Co. *v.* Burman (1905) 141 Fed. 835.

[31] People *v.* Loeb Ins. Co. (1883) 91 N. Y. 174; People *v.* Am. Loan Co. (1902) 172 N. Y. 371.

[32] (1906) 143 Fed. 579.

[33] *In re* Inman (1909) 171 Fed. 185; s. c. (1910) 175 Fed. 312.

[34] Pardee *v.* Kanady (1885) 100 N. Y. 121; *In re* Niagara Radiator Co. (1908) 164 Fed. 102.

claims in cases of anticipatory breach, the third objection to the solution offered in the shape of this doctrine, must be faced. This objection is that, even though bankruptcy may constitute an anticipatory breach, the claimant is not compelled to act accordingly. It is at his option to come in and prove his claim in the bankruptcy proceedings, or to wait until the performance day of the contract arrives and call upon the bankrupt to perform his agreement. If the latter does not obey, he may be sued for the breach thus resulting, and his intervening discharge in bankruptcy is no defense to the action.[35]

The doctrine of anticipatory breach, therefore, as a solution of the question, is as one-sided as it is narrow of application. It operates only to the benefit of the creditor, giving him an option whether to prove against the estate, or waylay the debtor when he emerges from his bankruptcy.

Nor, apparently, can the maturity of a claim be accelerated, in the event of bankruptcy, by any but an express contractual provision to that effect, if indeed, an express proviso to that effect is valid. In *Ex parte Houghton*[36] there is a *dictum* by Lowell, *J.*, that, while future installments of rent are not provable against the lessee's estate in bankruptcy, yet by contract the contingency of the lessee's bankruptcy may be provided for. The learned judge says:

"It is not uncommon now for leases to contain a provision that in case of breach the lessor may enter and relet the estate at the expense and risk of the lessee and charge him with the deficiency. Under such a clause the lessor might well have the right to prove for the full amount of the damages which should be ascertained by such reletting."

But this *dictum* was overruled by the Circuit Court of Appeals, Eighth Circuit, in *Watson* v. *Merrill*.[37] In that case, doubtless resting on the *dictum* of Lowell, *J.*, the landlord put in a claim for the difference between the rental value of the premises for a similar term, and the rent as provided by the lease. That lease contained a clause similar to that described by Lowell, *J.* The court, however, held that the claim was not provable, saying:

"It is, however, the nature of the claim, and not the name which is applied to it, that conditions its provability in bankruptcy."

[35]Phenix Nat. Bank *v.* Waterbury (1910) 197 N. Y. 161.
[36]*Supra.*
[37]*Supra.*

In other words, the learned court says that there can not be any anticipatory breach of a rent covenant. As there can be no anticipatory breach of that covenant, the question of the measure of damages cannot arise, and no claim can be made under such a covenant, no matter upon what theory of damages it may stand.

The same view has been taken, and the rule of *Watson* v. *Merrill* adopted, in the Second Circuit, in the recent case of *In re Roth.*[38] In the Third Circuit it has been held that future rent is provable if the lease expressly accelerates it in the event of the lessee's bankruptcy. There is a *semble* to the same effect in *In re Roth.*

If the *rationale* of bankruptcy legislation is merely the interests of creditors, then these results are good enough. But is the object of such laws merely the interests of creditors? Is the welfare of the bankrupt of no consideration in the framing of our statutes? No judicial answer has ever been given in the affirmative since the day of the first great Chancellor. On the contrary. Lord Hardwicke declared, over a century ago, that the privilege of creditors to prove against the bankrupt's estate ought to be "coextensive and commensurate" with the privilege of the bankrupt to a discharge from his debts.[39]

And the object of all the successive statutes adopted in England to make unmatured claims provable in bankruptcy was as much to discharge the debtor from the burden of his contracts as to allow his creditors to prove thereon against his estate. Lord Hardwicke's words, above mentioned, state, as Lord FitzGerald has said, "two of the main objects of the bankrupt laws—that *all* creditors should be entitled to come in and prove, and that the bankrupt should emerge from the bankruptcy freed from all his liabilities."[40]

Lord Selborne, in the same case, said:

"For the principle of the old bankrupt laws, which did not admit to proof any claims for liabilities contingent at the time of bankruptcy, much might perhaps be said. * * * But the legislature, for whatever reason, has gone at least far enough to exclude from the consideration of the present question à priori arguments of that kind."

The present situation of an American bankrupt, in the case of an outstanding and unmatured contract to which he is a party, is this:

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[38](1910) 181 Fed. 667.

[39]*Ex parte* Groome *supra.*

[40]Hardy *v.* Fothergill *supra.*

(1) If the creditor desires to prove against the bankrupt's estate, he may, under some decisions, do so; but under all the authorities, it is at his option whether to prove or not.

(2) If the creditor does not desire to prove against the bankrupt's estate, the contract remains open and subsisting. If the bankruptcy trustee sees fit to do so, he can adopt the contract and perform it himself, but is not entitled to the prior agreed terms of credit.[41] The trustee has a reasonable time within which to decide whether to adopt or reject the contract.[42] Pending his decision, the contract remains vested in him, subject to his disclaimer, should he decide not to adopt it.[43] If the trustee adopts the contract, then the bankrupt is exonerated therefrom, and the trustee takes it for better or for worse, with all its rights and burdens.[44] But if the trustee should not adopt it, then it remains the bankrupt's contract, just as though there had been no bankruptcy. Should he fail to perform it properly, the bankrupt may be sued for the breach, and his discharge in bankruptcy will not protect him.[45]

In England, no such contract is available against the bankrupt after the filing of the petition. All outstanding agreements pass to the trustee. Like the American trustee, of course, the English official has a reasonable time within which to decide whether he will adopt or disclaim each such contract. If he adopts it, the same result follows as with us. The trustee steps into the bankrupt's shoes, and the contract becomes his, with all its rights and burdens. But if the trustee disclaims the contract, the creditor cannot hold the bankrupt thereon. The liability of the bankrupt is forever ended, and the sole right of the creditor is to prove his claim under the provision of the English Bankruptcy Act already discussed.

It is respectfully submitted that our Bankruptcy Act should be amended so as to be similar to the present English statute in regard to unmatured claims. The reasons for this have practically been stated already, but may be here summarized:

[41]Vandegrift *v.* Cowles Eng. Co. (1900) 161 N. Y. 435; New England Iron Co. *v.* Gilbert El. Ry. Co. (1883) 91 N. Y. 153; Matter of Carter (1898) 21 App. Div. 18, aff'd. 155 N. Y. 627.

[42]Dushane *v.* Beall (1896) 161 U. S. 513, and cases there cited.

[43]*In re* Frazin & Oppenheim (1909) 174 Fed. 713, 716.

[44]Bourdillon *v.* Dalton (1704) 1 Esp. 236; Turner *v.* Richardson (1806) 7 East 335; *Ex parte* Till (1873) L. R. 16 Eq. 97; Dayton Hyd. Co. *v.* Felsenthal (1902) 116 Fed. 961; *In re* Wiseman (1908) 159 Fed. 236; Buckner *v.* Jewell (1876) 14 Nat. Bank. Reg. 286.

[45]Ames *v.* Moir (1891) 138 U S 306, 311; Phenix Nat. Bank *v.* Waterbury *supra;* Boot *v.* Wilson (1807) 8 East 311.

(1) The need for the allowance of certain kinds of contingent claims is apparent from the attempt of many of our courts to allow such claims to be proven on the theory of anticipatory breach.

(2) But it is doubtful whether the application made by these courts of the theory mentioned is sustainable in law.

(3) Even though the theory of anticipatory breach were permissible to allow the proof of unmatured claims, its range of application is comparatively narrow, and it would not justify the allowance of all unmatured claims.

(4) If certain kinds of unmatured claims are to be allowed in proof, then all should be. No ground of demarcation should be drawn in this regard. The only exception should be in the case of (*a*) claims impossible of any sort of adjustment, and (*b*) those based on contracts looking to the exchange of money for some other consideration, as distinct from agreements whose breach can be compensated for only by the specific delivery of a thing or performance of an act. That is the distinction taken in *In re Reis,*[46] above discussed.

(5) The necessities of the bankrupt, in the average case, require this as well as the interests of the creditors. Both considerations should appeal to a legislature in the enactment of bankruptcy laws. As the law now stands, the bankrupt's continuance of liability on his unmatured contracts depends purely on the chance of his trustee's decision to adopt them. From his matured obligations the honest bankrupt gets an absolute discharge. But from his unmatured obligations, however heavy they may be, the matter of his discharge is aleatory, but with not even a gambler's chance to the bankrupt. If his outstanding contracts are good propositions, the trustee will adopt them and work them out for the benefit of the creditors. But if such contracts are merely burdensome, then the trustee will disclaim them, and the bankrupt cannot be relieved from liability on them.

(6) The joint interests of the bankrupt and the majority of his creditors in many cases are seriously affected by the presence of such outstanding agreements. The holders of such unmatured obligations cannot be made to consent to any composition or scheme of arrangement which the bankrupt might propose and the rest of

[46] [1904] 2 K. B. 769, aff'd. Clough *v.* Samuel [1905] A. C. 442.

his creditors be willing to accept. In the writer's own experience he has known of a reorganization scheme which nearly failed of accomplishment, though all the creditors with provable claims desired it, because of the attitutde of a landlord who had the insolvent fast under a lease with ten years of an exorbitant rental yet to run. It is all very well to say that such unpleasant situations generally adjust themselves—so it happened in the case mentioned—but is it not better to put on an equality all persons having interest in the bankrupt's affairs? Equality of distribution, and a clean slate for the honest bankrupt, will, it is submitted, best be secured by allowing the proof of contingent claims, and barring their assertion against the discharged bankrupt.

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